Supreme Court, U.S.
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Docket No.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1995

ROGER GRIFFIN, Petitioner

v.

UNITED STATES of AMERICA

ON PETITION for WRIT of CERTIORARI
to the UNITED STATES COURT OF APPEALS
for the FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Charlotte, NC 28220-2137
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the government's arbitrary refusal to move the district court for a downward departure pursuant to 5K1.1 of the Sentencing Guidelines violated the Due Process Clause where the petitioner adduced uncontradicted evidence of his substantial assistance and where the government's refusal was based solely on its unsupported position that the petitioner could have provided additional cooperation?

2. Whether the district court committed reversible error in denying petitioner's motion for a hearing in accordance with 6A1.3 of the Federal Sentencing Guidelines in order to properly determine whether the government had acted in an unconstitutional manner when it refused to make a 5K1.1 motion for a downward departure based on an unsupported claim that the petitioner "could have done more" but where the petitional adduced uncontradicted evidence of his substantial assistance?

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United States v. White, 869 F.2d 822 (5th Cir. 1989)

USSG 5K1.1, 6A1.3.
Due Process Clause, Fifth Amendment

STATEMENT OF JURISDICTION

1. The petitioner was sentenced on January 26, 1994. On March 14, 1994 the District Court denied his motion for an evidentiary hearing to determine whether the government acted in bad faith in refusing to make a 5K1.1 motion. On timely notice of appeal the Court of Appeals for the Fourth Circuit on July 6, 1995 affirmed the District Court's March 14, 1995 order and the petitioner's sentence. The Court's mandate was filed July 28, 1995.

2. Jurisdiction to review this Petition is conferred upon this Court by Title 28 USC 1254(1).

3. Service has been made on the United States as follows:

Solicitor General
of the United States
Room 5614, Department of Justice
10th Street and Constitution Ave., NW
Washington, DC 20530

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the United States Constitution is involved in this matter, as are Federal Sentencing Guidelines 5K1.1 and 6A1.3.

STATEMENT OF THE CASE

The, petitioner was arrested on February 7, 1992. He entered a plea of guilty on October 27, 1992 to a one count Bill of Information alleging a violation of Title 21 USC 841. On January 26, 1994 he was sentenced to a five (5) year term of imprisonment by the Honorable Graham C. Mullen, district court judge for the Western District of North Carolina.

For a period of approximately two (2) years, prior to and after executing the plea agreement, the petitioner assisted law enforcement in his community of Monroe, NC.

Despite that effort the government re-

fused to make a 5K1.1 motion prior to the petitioner's sentencing. At the sentencing hearing, DEA Agent Tony Ballas testified that the petitioner had been debriefed by law enforcement on numerous occasions; that he had provided additional information to law enforcement regarding drug activity, which information resulted in an arrest and conviction; that he had cooperated with the State Bureau of Investigations ; and, that he had actually participated in supervised undercover purchases of controlled substances.

Agent Ballas further testified that he knew that the petitioner had, in fact, provided "other information to law enforcement" but said that he did not "know the particulars" of that information.

Nonetheless, Ballas testified that he believed the petitioner could have "done more", although he never explained exactly why he was of that opinion.

Other law enforcement officials, however, did have specific personal knowledge of

the petitioner's cooperation. The Sheriff of Union County wrote, that the petitioner "has been instrumental in providing this office with vital information which resulted in felonious drug and firearms charges being brought against another." Continuing, Sheriff McGuirt stated that the petitioner, "has gone far out of his way to assist in the administration of justice and the prevention of further crimes."

The petitioner also testified. He explained the extent of his cooperation. He testified that he had been debriefed several times; that he cooperated to the best of his ability; that he made undercover purchases of controlled substances; and, that other individuals had been arrested as a result of that cooperation. He also stated that law enforcement's "main target" had learned of his cooperation; that he had received "warnings"; that he was concerned for his family's safety; and, that he did not believe that law enforcement had provided adequate protection.

Despite that evidence, the government

refused to move under 5K1.1 of the guidelines for a downward departure, stating that the petitioner, in its view, could have done more. At allocution, the prosecutor stated, "It is strictly a matter of him not doing both what he could do and what he said he would do. And it's on the basis of that we do not make a downward departure motion."

He was sentenced to an active sixty (60) month term of imprisonment. The Judgment and Commitment Order was filed March 1, 1994.

On February 4, 1994 he moved the court for a correction of sentence and for specific performance. He further requested an evidentiary hearing, arguing that the government had acted in bad faith. The district court denied his motion by order filed March 15, 1994. On March 28, 1994 the petitioner filed Notice of Appeal.

ARGUMENT

The petitioner readily acknowledges the wide latitude which Congress has granted the

government in determining whether a motion for a downward departure should be made. However, repeatedly the courts have stated that the government's discretion on this issue is not absolute.

DUE PROCESS–THE RESULTING INTERPRETIVE DOCTRINE

The cases which address the issue of the government's refusal to make a 5K motion present two separate fact patterns: (1) plea agreements which do not contain language regarding the government's willingness to make the motion and, (2) those that do.

This factual distinction is important. Where the plea agreement does not include 5K language, no amount of substantial assistance, standing alone, will require the government to make the motion and the court is powerless to downwardly depart, unless the government's refusal is base on an unconstitutional motive. United States v. Wade, ___US___, 112 S.Ct. 1840 (1992). Wade stated that such

motives would include race or religion. However, Wade did not limit constitutional transgressions to these two factors alone.

Where the plea agreement does include a promise by the government to make the motion upon the defendant's rendering of substantial assistance the government, by playing this chip, "bridles its discretion with the terms of the agreement, and the district court has the power to review the government's refusal to make the motion just as it would any alleged breach of the plea agreement." United States v. Dixon, 998 F.2d 228, 230 (4th Cir. 1993).

Although, when 5K language is present, the court may begin its analysis with the prevailing body of commercial contract law, other considerations are simply more important. In United States v. Harvey, 791 F.2d 294 (4th Cir. 1986) the Fourth Circuit noted that "the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally

from and run wider than those of commercial contract law." Id. @ 300. Additionally, Harvey said that in "federal prosecutions the court's concerns run even wider than the protection of the individual constitutional rights." Id. At stake, said Harvey, is the "very honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." Id. citing, United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972). Thus, said Harvey, the "resulting interpretive doctrine is an amalgam of constitutional, supervisory and private law...." Id. @ 300.

This amalgam bears heavily on the instant case. As noted above, the plea agreement here contains the unequivocal promise by the government to make a 5K motion if the defendant rendered substantial assistance. Thus, the petitioner's case is on "separate footing" from those where no such promise appears. Conner, supra.

Where the government has failed to honor the terms of the agreement that it has with the defendant the circuit courts have shown no reluctance in exercising their supervisory powers. For example, in United States v. Ringling, 988 F.2d 504 (4th Cir. 1992) the government promised to make the defendant's cooperation known at sentencing. Thereafter it refused to even interview the defendant claiming that to do so would be a "waste of time." Despite the fact that the agreement expressly stated in the agreement that the government was "not promising to move for a departure..." the court found that the government "breached its obligation to Ringling by failing to provide information as to the extent of his cooperation to the district court." Id. @ 506.

Recently, in Dixon the Fourth Circuit found that the government's refusal to make the motion breached the agreement where the defendant, in fact, did render substantial assistance. There the agreement plainly stated

that the government would so move if the defendant substantially assisted in the investigation or prosecution of others. The record revealed that Dixon had, in fact, rendered substantial assistance in the investigation of another person. Thus, said the court, the government's failure to move breached the agreement.

Significantly, the government in Dixon, as here, sought to find refuge in the language that Dixon's efforts "must be deemed by the government as providing substantial assistance." Id. @ 230. Such language, said the court, "cannot be read quite so deferentially." Id.

Similarly, the language in the petitioner's agreement stating that the government retained sole discretion to determine whether he provided substantial assistance cannot be read quite so deferentially. The amalgam of constitutional and supervisory law requires that, when such language is present, the government will not act in an arbirary

manner when it decides not to make the motion. In the instant case one of the highest ranking law enforcement officers in Union County stated that the petitioner "had gone far out of his way" in assisting law enforcement. The federal agent who testified at the sentencing admitted to a number of aspects of his cooperation including those of providing information about drug activity, being debriefed on a number of occasions, engaging in under-cover drug purchases and assisting in the arrest and drug conviction of another person. Yet, at sentencing the government arbitrarily ignored those efforts. Instead it told the court, without explanation or evidence, that in its opinion the petitioner "could have done more" and therefore refused to move for a downward departure.

CONFLICT WITH OTHER CIRCUITS

The interpretive doctrine cannot countenance such callus treatment when an individual's constitutional rights are involved and where the honor of the government

and the fair administration of justice are intertwined. Such treatment violates the terms of the contract and debases the fundamental fairness which due process embodies.

The Fourth Circuit's opinion in the instant case, therefore, not only ignores the precepts of its earlier rulings, but runs counter to the holdings of other circuits as well. In United States v. Justice, 877 F.2d 664 (8th Cir. 1989), the Eighth Circuit said that in the appropriate case the district court could move, *sui sponte*, in the face of the government's refusal when the defendant establishes the fact of his substantial assistance. The Fifth Circuit, in United States v. White, 869 F.2d 822 (5th Cir. 1989), held that the court may entertain the defendant's showing that the government refuses to recognize his substantial assistance. In United States v. Knights, 968 F.2d 1483 (2nd Cir. 1992), after acknowledging the wide latitude which the government enjoys, the Second Circuit expressly stated, "That latitude, how-

ever, does not permit it to ignore a defendant's cooperation simply because the defendant is supplying information that the government does not want to hear'". Again, in United States v. Rexach, 896 F.2d 710 (2nd Cir. 1990) the Second Circuit held that, such latitude notwithstanding,

> Nevertheless, the prosecutor's discretion is not completely unlimited. There is, as Rexach argues, an implied obligation of good faith and fair dealing in every contract. A prosecutors's determination of dissatis-faction, just as with other areas of prosecutorial discretion, cannot be made invidiously or in bad faith. Id. @ 714

Thus, it is clear that the amalgam of constitutional and supervisory law requires that the government not arbitrarily ignore the petitioner's pre-sentence cooperation, for to do so breaches the agreement's implied obligation of good faith and fair dealing and in so doing denigrates due process, jeopardizes the honor of the government and impairs the fair and effective administration of jus-

tice.

MISAPPLICATION 6A1.3 OF THE GUIDELINES

Wade plainly states that where the government has agreed to make a downward departure motion upon receiving substantial assistance or where the defendant makes a sufficient showing that the government's refusal to make the motion is based on unconstitutional motives, he is entitle to an inquiry. In the instant case the petitioner has shown both. In Conner, supra, the Fourth Circuit said, "The task of the trial court is to determine if the government has in fact agreed to make the motion in return for substantial assistance, and if so, whether the defendant has satisfied his contractual obligations." Id. @ 1075. Again, in United States v. Wallace, 22 F3d 84 (4th Cir. 1994) the Fourth Circuit acknowledged the defendant's right to a factual finding in the face of the government's refusal where the plea agreement contains 5K language or where the government is alleged to have acted in bad faith. Id @ 87.

Guideline 6A1.3 states that when a reasonable factual dispute arises which affects sentencing, "the parties shall be given an adequate opportunity to present information to the court regarding that factor." Subsection (b) of the Guideline states that in resolving disputed factors, the court shall "notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposing sentence." Finally, the commentary to the Guideline recognizes that such formality is necessary under guideline sentencing because specific disputed factors can and do have a "measurable effect on the applicable punishment." Thus, says the commentary, more formality is "unavoidable."

The petitioner's case closely parallels that of United States v. Leonard, 50 F.3rd 1152 (2nd Cir. 1995). There the government agreed to move for a downward departure upon receiving Leonard's substantial assistance. For two months after his arrest Leonard coop-

erated with the government including taping conversations with a co-conspirator which led to his arrest and that of two other individuals. Thereafter the government took the position that Leonard had frustrated another investigation and had made several inconsistent statements to law enforcement and, therefore, it would not make a 5K motion.

The Second Circuit remanded the case for an evidentiary hearing stating that "where a plea agreement provides that the government will file a 5K1.1 motion if it determines that the defendant has provided substantial assistance, a court's review of the government's decision not to file a 5K1.1 motion is more searching." Id. @ 1157. It continued, stating, where the plea rests to a significant degree on a promise by the prosecutor, the court may review the government's refusal to determine whether that action is based on "good faith". Id. Citing, United States v. Knight, 968 F.2d 1483 (2nd Cir. 1992).

The same should obtain here. In this case, the petitioner plainly was denied the benefit of Guideline 6A1.3. He did not have an adequate opportunity to present information. At such a hearing he would have had an opportunity to obtain and examine the government's files pertaining to his cooperation. He would have been able to adequately challenge the government's naked claim that he could have done more. He would have been able to explore what safety precautions the government actually took while he worked under-cover. The district court should have received all of this information before imposing a sentence which was "sufficient, but not greater than necessary, to comply with the purposes of [sentencing]". 18 USC 3553; See also, 18 USC 3661.

Moreover, the district court did not make the tentative findings required by the Guideline setting forth its reasons for concluding that the government had not breached the agreement nor acted with an unconstitutional man-

ner.

Indeed, the court could not have made any such findings based on the evidence presented. Nothing was before the court, at the time of sentencing, upon which the it could make a determination that the petitioner had not "satisfied his contractual obligation." In fact, the opposite is true. The only evidence then existing was that he had cooperated. In the face of that evidence, the government took the position that it did not have to make the motion offering, weakly, that in its opinion the petitioner could have "done more".

CONCLUSION

Based on the foregoing points and authorities and further based on the conflict among the circuits regarding the scope of the trial court's authority to review the government's arbitrary refusal to move under 5K and on the far-reaching policy considerations implicit in the district court's refusal to hold a 6A1.3 hearing, the petitioner

respectfully requests this Honorable Court to grant the within writ.

Respectfully submitted, this the 28th day of October, 1995.

_____

Kenneth P. Andresen
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:92CR280-MU
Filed February 4, 1994

UNITED STATES OF AMERICA	)
	)
	)
v.	)
	)
ROGER GRIFFIN	)

MOTION FOR SPECIFIC PERFORMANCE, FOR CORRECTION OF SENTENCE AND FOR EVIDENTIARY HEARING AND MEMORANDUM IN SUPPORT

****

NOW COMES THE DEFENDANT, through counsel, and hereby moves this Honorable Court for an order directing the government to specifically comply with the terms of the plea agreement entered in this matter; and,

FURTHER MOVES this Honorable Court, pursuant to Rule 35(c), for a correction of his sentence so as to reflect specific compliance by the government with the terms of the plea

agreement entered in this matter; and,

FURTHER MOVES this Honorable Court for an evidentiary hearing in connection with his motion for specific performance.

MEMORANDUM OF SUPPORT

A. FACTUAL BACKGROUND

1. The defendant was first arrested by law enforcement officials in connection with this matter on February 7, 1992 and subsequently charged in indictment 3:92-CR-36 with a violation of Title 18 USC 846.

2. Subsequently, the government dismissed indictment 3:92-CR-36 and proceeded against the defendant in a Bill of Information, Docket No. 3:92-CR-280, the instant matter.

3. On October 27, 1992 the defendant executed a plea agreement (the Agreement) with the government which was filed with the Court on the same date.

4. In paragraph 4 of the Agreement, the government agreed to move the Court, pursuant to Section 5K1.1 of the Federal Sentencing Guidelines, for a downward departure upon its

determination that the defendant had rendered substantial assistance.

5. On January 26, 1994 the defendant appeared before this Honorable Court for sentencing. During the sentencing hearing the Court received testimony from S.A. Ballas, DEA and from the defendant to resolve a factual dispute concerning the amount of controlled substance with which the defendant could reasonably be held accountable so as to determine the proper Sentencing Guideline Level. The Court also received various letters offered by the defendant.

6. The uncontroverted evidence, provided by Agent Ballas and the defendant, established that the defendant had met with law enforcement on numerous occasions; had provided valuable information to law enforcement regarding illegal activity by others; had been responsible for the arrests of several individuals; had, in fact, worked in an under-cover capacity at the direction and under the supervision of law enforcement; had made several

under-cover purchases of controlled substances also at the direction and under the supervision of law enforcement; and, on at least one occasion, had worn a body wire while serving in an under-cover capacity.

7. The evidence also included a letter dated September 10, 1993 from the Sheriff of Union County, the Honorable Frank McGirt, who stated that the defendant had provided "vital information" regarding felonious drug and firearms charges (charges which have been of utmost interest to law enforcement) and further stating that Mr. Griffin had "gone far out of his way to assist in the administration of justice and the prevention of further crimes."

8. The uncontroverted evidence also showed that the defendant believed that his safety was in jeopardy on several occasions while providing assistance due to law enforcement's failure to take appropriate safety precautions given that the defendant's community is small, tight-knit and one in which he is well known.

9. Despite this evidence, and indeed in the face of it, the Assistant United States Attorney declared that the defendant had not rendered substantial assistance to the government and was unable to call a "single law enforcement office" to appear on his behalf. The government therefore refused to make a motion under 5K1.1.

B. ARGUMENT AND LAW

Based on the AUSA's statements during allocution, it appears that the government has taken the position that, despite the defendant's undeniable assistance, in its opinion he could have done more and thus he is undeserving of a downward departure motion.

A plea agreement, unlike a commercial contract, is bottomed in fundamental constitutional concepts of due process, good faith and fair dealing. Accordingly, the government is not at liberty to disregard its agreement to move for a downward departure when its refusal is arbitrary, capricious or otherwise grounded in bad faith or an abuse of

discretion. United States v. Dixon, 998 F.2d 228 (4th Cir. 1993). Such is clearly the case here.

Furthermore, under such circumstances, the government may not seek protection in any language appearing in the Agreement purporting to reserve unto itself the sole discretion for making a determination of substantial assistance or imposing a waiver on the defendant of the right to complain about arbitrary, capricious abusive or bad faith conduct.

Our circuit has held that the court must closely scrutinize plea agreements resolving any impreciseness or ambiguities in favor of the defendant because the rights involved are generally fundamental and constitutionally based. United States v. Garcia, 956 F.2d 41, 43-44 (4th Cir. 1992); United States v. Harvey, 791 F.2d 294,299 (4th Cir. 1986).

Recently our circuit granted a defendant's motion to enforce the plea agreement where it found that the government had acted in a man-

ner contrary to its terms in refusing to inform the court of his co-operation. United States v. Ringling, 988 F. 2d 504 (4th Cir. 1992).

In Dixon, supra, our circuit held that the District Court has the power to review the government's refusal to make a 5K1.1 motion, citing Santobello v. New York, 404 US 257, 262 (1971). The court noted that when the government offers to make a downward departure motion it "bridles its discretion with the terms of the agreement and the District Court has the power to review the government's refusal to make the motion just as it would any alleged breach of the plea agreement." Id. at 230.

Indeed, the Supreme Court in United States v. Wade, ___US___, 112 S.Ct. 1840 (1992) found that the court may, sui sponte, downwardly depart, even in the absence of an agreement, where the government's failure to move is based on an unconstitutional motive.

Here the evidence plainly demonstrates

the government's bad faith and abusive conduct. Claiming that the determination regarding substantial assistance resided within its sole discretion, the government refused to honor its agreement. Instead, attempting to justify its refusal, it thrust upon the court its ambiguous, non-specific, uncorroborated and unsupported position that, despite the defendant's assistance, he could have done more. This position, however, belies Sheriff McGirt's laudatory comments penned just a few short months before Mr. Griffin's sentencing and the Agent's own testimony.

Furthermore, the question for this court is not whether the defendant could have done more, but whether in refusing to acknowledge the defendant's co-operation as substantial the government has acted abusively, arbitrarily or in bad faith.

Based on the evidence thus far presented, the defendant is clearly entitled to have this court determine that the government has indeed acted improperly in refusing to make a

5K1.1 motion.

WHEREFORE, the defendant prays this Honorable Court to grant the motions for specific performance, for a correction of his sentence and for an evidentiary hearing.

This the 4th day of February, 1994.

Kenneth P. Andresen
Attorney for the Defendant

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:92CR280-MU
Filed March 15, 1994

UNITED STATES OF AMERICA	)
	)
	)
v.	)
	)
ROGER GRIFFIN	)
	)

ORDER

This matter comes to the court on defendant's Motion For Specific Performance, For Correction of Sentence and For Evidentiary Hearing and Memorandum In Support, filed on February 4, 1994.

This court finds the government's refusal to move for a downward departure was not arbitrary, capricious, or otherwise grounded in bad faith or abuse of discretion.

IT IS, THEREFORE, ORDERED that defendant's Motion For Specific Performance, For Correction of Sentence and For evidentiary Hearing is DENIED.

IT IS FURTHER ORDERED that this order, the government's Motion to Seal, and the government's Response to Motion For Specific Performance be SEALED until further order of this court.

The Clerk of Court is directed to certify copies of this Order to the attorneys of record.

THIS the 14th day of March, 1994.

Graham C. Mullen
United States District
Court Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROGER GRIFFIN,
Defendant-Appellant.

No. 94-5298

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, District Judge.
(CR-92-280-MU)

Submitted: February 28, 1995

Decided: July 6, 1995

Before WILKINSON, NIEMEYER, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Kenneth P. Andresen, Charlotte, North Carolina, for Appellant. Mark T. Calloway, United States Attorney, Kenneth D. Bell, Assistant United States Attorney, Kenneth M. Smith, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Roger Griffin pled guilty to an information charging him with possession of cocaine with intent to distribute, 21 U.S.C.A. § 841 (West 1981 & Supp. 1994). He appeals his sixty-six month sentence, alleging that the government's decision not to move for a downward departure based on substantial assistance, USSG § 5K1.1,* violated due process and breached the plea agreement. He also argues that the district court erred in denying his post-sentencing motion for specific performance of the plea agreement, correction of sentence, and evidentiary hearing on substantial assistance. We find no merit in these claims and affirm both the sentence and the denial of the post-sentencing motion.

First, we find that Griffin has not validly waived his right to an appeal based on the government's determination concerning substantial assistance, although his plea agreement so provided. Such a waiver must be knowing and intelligent, and is ineffective where the district court fails to question the defendant about it in the Fed. R. Crim. P. 11 hearing, as happened here. *See United States v. Wessells*, 936 F.2d 165, 167-68 (4th Cir. 1991). Therefore, we consider the merits of the appeal.

Griffin's plea agreement provided that Griffin would cooperate and that the government, in its sole discretion, would determine whether his assistance was substantial. If his assistance was determined to be substantial, the government would move for a departure. A decision that Griffin had not provided substantial assistance was also within the sole discretion of the government. At sentencing, Griffin described his efforts to cooperate and argued that his cooperation had

*United States Sentencing Commission, *Guidelines Manual* (Nov. 1993).

been sufficient to require the government to make the motion. He submitted a letter from the sheriff of Union County which stated that Griffin had provided valuable assistance; however, a Drug Enforcement Administration agent testified for the government that all the agents who had worked with Griffin, both federal and state, believed that he had not cooperated fully. The government attorney refused to make a section 5K1.1 motion, stating that he did not believe the assistance Griffin had rendered was substantial.

Without making a finding on whether Griffin had rendered substantial assistance, the district court sentenced him within the guideline range. Nine days after he was sentenced, Griffin submitted a motion seeking specific performance of the plea agreement, correction of his sentence, and an evidentiary hearing. Griffin argued that the government had refused to recognize the assistance he had given, and had acted abusively, arbitrarily, or in bad faith in refusing to move for a departure. The district court denied the motion, finding that the government's refusal was not arbitrary, capricious, in bad faith, or an abuse of discretion.

The district court may inquire into the reasons for a government decision not to move for a departure under section 5K1.1 only if there is proof that the plea agreement has been breached or that the government's decision was based on an unconstitutional motive, such as racial or religious bias. *United States v. Wallace*, 22 F.3d 84, 87 (4th Cir.) (citing *Wade v. United States*, 60 U.S.L.W. 4389, 4390 (U.S. 1992)), *cert. denied*, 63 U.S.L.W. 3266 (U.S. 1994). Griffin did not allege any unconstitutional motive of the kind described in *Wade* in the district court. On appeal, he attempts to characterize the government's decision that he had not given substantial assistance as a due process violation. However, he does not make even a threshold showing that any suspect motive was behind the government's decision.

When a plea agreement promises unequivocally that the government will move for a substantial assistance departure in return for the defendant's substantial assistance, and the government subsequently decides not to file a section 5K1.1 motion, the defendant may claim that the agreement has been breached and move for specific performance. *United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir.), *cert. denied*, 60 U.S.L.W. 3359 (U.S. 1991). The district court must then

make a factual determination as to whether the defendant has provided substantial assistance. If it finds that he has, the district court may order specific performance of the agreement. *United States v. Dixon*, 998 F.2d 228, 230-31 (4th Cir. 1993).

Griffin's plea agreement did not contain an unconditional promise to make a section 5K1.1 motion; rather, the government promised to determine, in its sole discretion, whether substantial assistance had been rendered, and to make the motion if it determined that Griffin had done so. Because the government determined that Griffin had not provided substantial assistance, its decision not to make the motion did not breach the plea agreement. *See Wallace*, 22 F.3d at 87.

Because there was no enforceable promise for a substantial assistance motion and no proof of unconstitutional motive on the part of the government, the district court did not err in failing to make a finding concerning substantial assistance. Under *Wade* and *Wallace*, Griffin was not entitled to an evidentiary hearing or a finding by the district court on the quality of his assistance.

Moreover, the district court in this case had no authority to alter Griffin's sentence. After sentence has been imposed, the district court may not alter the sentence except as authorized by Fed. R. Crim. P. 35 or 18 U.S.C.A. § 3582(c) (West 1985 & Supp. 1994). *See United States v. Fraley*, 988 F.2d 4, 6 (4th Cir. 1993). Rule 35 provides for (1) correction of a sentence on remand, (2) reduction of a sentence for substantial assistance rendered after sentencing, and (3) correction of arithmetical, technical, or other clear error within seven days of sentencing. Section 3582(c) allows reduction of a sentence on a motion of the Director of the Bureau of Prisons and when the applicable guideline has been amended retroactively as described in guideline section 1B1.10. Because none of these circumstances were present, the post-sentencing motion was correctly denied.

Accordingly, we affirm the sentence imposed by the district court and its order denying Griffin's post-sentencing motion. We dispense with oral argument because the facts and legal contentions are ade-

quately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED